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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/607,313	06/28/2000	Brad Baker	30687-US	6871
5179	7590	10/11/2006	EXAMINER TRAN LIEN, THUY	
PEACOCK MYERS, P.C. 201 THIRD STREET, N.W. SUITE 1340 ALBUQUERQUE, NM 87102			ART UNIT	PAPER NUMBER 1761

DATE MAILED: 10/11/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)	
	09/607,313	BAKER, BRAD	
	Examiner Lien T. Tran	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 21 July 2006.
- 2a) This action is FINAL.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 30-52 is/are pending in the application.
- 4a) Of the above claim(s) 33,34-40,43-48 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 30,32,41,42 and 49-52 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 5) <input type="checkbox"/> Notice of Informal Patent Application |
|  | 6) <input type="checkbox"/> Other: _____                          |

Art Unit: 1761

Upon further consideration, claims 41,42,49-50 are included in the examination because they are not drawn to a distinct invention or species. Claims 33-40, 43-48 are remained withdrawn from consideration for the same reason set forth in the previous office action.

In the response filed 7/21/06, applicant remarks that the examiner has misapplied section of MPEP 821.03. While stating this, applicant does not explain how this section is misapplied. Section 821.03 states " if, after an office action on an application, the applicant presents claims directed to an invention distinct from and independent of the invention previously claimed, the applicant will be required to restrict the claims to the invention previously claimed if the amendment is entered". As explained in the previous office action, the new submitted claims are drawn to distinct species and distinct independent invention. Even if the claims are depended on an independent claim, they can still be subjected to an election of species if the species are distinct. Independent claim 43 is drawn to a completely different invention from the one that was original elected. Applicant makes the statement that the claims do not contain elements related to the assertion for necessitating withdrawal; however, applicant does not present any reason to show that the claims are not drawn to different species and invention. The claims remain withdrawn from consideration.

Claims 30, 32,41,42, 49-52 are rejected under 35 U.S.C. 103(a) as being unpatentable over the brochure on " Paint Pop" product in view of Sinski and Chan.

The brochure discloses Paint Pop which comprises candy in the shape of a paint roller, a packet comprising candy powder and a paint tray. The candy powder is

emptied into the paint tray and the candy is rolled in the paint tray for consumption. The candy has a non-edible handle portion an edible portion attached to the handle.

The brochure does not disclose the shape of a paint brush/paint can and the handle portion being edible, packaging the product and the handle not covered in use.

Nickels disclose a paint can and paint brush combination. (see columns 3-4)

Sinski discloses a paint can having a lid securable to an opening of the paint can. ( see figures 4-5 and col. 3 lines 59-62)

Chan discloses a lollipop comprising a ball of hard candy and an edible stick inserted into a cavity of the ball of candy. The stick comprises pressed candy. ( see col. 1 lines 28-35)

The claimed product differs from the prior art product in the shape. Applicant is moving from one conventional design shape to another conventional design shape. A paint tray, a paint can, a paint brush and a pain roller are all conventional shapes. To change from one conventional shape to another conventional shape would have been obvious to one skilled in the art because such shapes are all well known in the art. Nickel shows a paint can and paint brush combination. It would have been obvious to one skilled in the art to make a paint can/paint brush candy combination because such shape is conventional in the painting product as shown by Nickels. As to the inclusion of a lid, it would have been obvious for one to include a lid when the product is made in the shape of paint can to prevent the content inside the container from falling out. Engaging a lid on a paint can is notoriously well known in the art as shown by Sinski. It

would have been obvious to make the handle to also be edible, as taught by Chan, in the lollipop to reduce wastage of the stick to give more candy to the product. The handle in Chan is not covered when in use. It would have been to package the confectionery product to make it convenient for handling and also for commercial distribution. Packaging food product is notoriously well known in the art.

In the response filed 7/21/06, applicant submits a 131 declaration to establish that the claimed product was conceived prior to the filing date of the Chan reference. The declaration is not persuasive. There is no evidence in the declaration to show that the invention was conceived prior to June 23, 1989. It is not known how the price quote is related to the claimed product. While the drawing shows sketches of brushes and can, there is no indication that the brush is edible or the can contains flowable confectionery or the drawing is related to a confectionery set.

Applicant's arguments filed 7/21/06 have been fully considered but they are not persuasive.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T. Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Monday, Wednesday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Cano Milton can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

October 2, 2006

*Lien Tran*  
LIEN TRAN  
PRIMARY EXAMINER  
Group 1707